From Whistleblower to RICO Claimant

The holiday season is past and many of us have returned to work. However, if you are a Chief Compliance Officer (CCO) there is a gift that you may wish to give yourself, it is "*The Whistleblower's Handbook - A Step-by-Step Guide to Doing What's Right and Protecting Yourself*" authored by Stephen Martin Kohn, Executive Director of the National Whistleblowers Center. I do not suggest that CCO's purchase this volume for their own protection, although the former Chief Executive Officer (CEO) of Olympus might have been able to use it before he was fired by the Olympus Board last October. No, I suggest that CCOs purchase this because many others in your company may well do so and it is the best single volume collection of all laws, rights and obligations related to whistle-blowing that I have come across.

I thought about Kohn's book when I came across a couple of whistleblower related items last month. The first one was an article in the December 28, 2011 edition of the Wall Street Journal (WSJ), entitled "*Internal BNY Mellon Documents Show Panic"* by Jean Eaglesham and Michael Siconolfi. In the article they report on some of the emails and other documentary evidence that whistleblower Grant Wilson was able to obtain during the two year period that he was operating "as a government informant" while employed by Bank of New York Mellon (BNY). The WSJ obtained this evidence through an open-records request. Wilson was part of a group which brought a series of whistleblower lawsuits against BNY, which have led to several states, and the Manhattan US attorney, filing civil suits against BNY. Eaglesham and Siconolfi also reported that "the bank's [BNY] foreign-exchange traders grew concerned about a leaker" and in an earlier WSJ article, entitled "*Secret Informant Surfaces in BNY Currency Probe*", reporter Carrick Mollenkamp stated "BNY Mellon sought to discover the insider's identity and to fight the lawsuits."

I quote that final line because of a December 15, 2011 Court of Appeals decision from the Seventh Circuit Court of Appeals, styled "*DeGuelle v. Camilli* et al", which is a whistleblower retaliation claim. As reported by Richard Renner, in an article entitled "*Major Victory for Whistleblowers in Seventh Circuit Says Retaliation is a RICO Violation"*, in the Whistleblowers Protection Blog, the Court of Appeals found valid a claim for damages under the Racketeer Influenced and Corrupt Organizations Act (RICO) for the retaliation against a whistleblower who provides information about corporate fraud to law enforcement officers under Sarbanes-Oxley Act (SOX). SOX itself makes it a felony to retaliate against whistleblowers who bring forward such information.

The SOX provision in question states that Congress made it a crime to:

"knowingly, with intent to retaliate, take[] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense[.]" 18 U.S.C. 1513(e).

The novelty and significance of the Seventh Circuit decision is that it held "*When an employer retaliates against an employee, there is always an underlying motivation. In this case, for example, the motivation was to retaliate against DeGuelle for disclosing the tax scheme. Retaliatory acts are inherently connected to the underlying wrongdoing exposed by the whistleblower*."

This means that any company which terminates or in any other way retaliates against a whistleblower may have engaged in a violation of RICO, which itself is a criminal statute. This becomes relevant to Foreign Corrupt Practices Act (FCPA) whistleblowers through the Dodd-Frank Whistleblowers provision. In excerpts from the final Securities and Exchanges Commission (SEC) comments, they stated "*Employees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by Section 21F(h)(1)(A)(iii) of the Exchange Act, which incorporates the broad anti-retaliation protections of Sarbanes-Oxley Section 806, see 18 U.S.C. 1514A(b)(2)*." In other words, if a person reports internally to a company or externally to the SEC of a FCPA violation and there is retaliation against that person, a RICO claim may arise.

Ladies and Gentlemen, this is scary stuff so your company had better be ready and have a robust investigative protocol in place when an internal report is made. And train, train, train and really, really, really mean it when your company says that it will not retaliate against an employee for making an allegation of a FCPA violation.